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## SALES WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE

T. E. LAUER\*

According to Williston, there is in the language of the law no more troublesome word than "warranty."<sup>1</sup> As applied to sales law, the meaning of "warranty" has varied from (1) an undertaking contemporaneous with, but collateral to, the contract of sale, to (2) an integral part of the sales contract itself. Thus in 1884 we find Biddle describing a warranty as

an express or implied statement of something with respect to the article sold which the seller undertakes shall be part of a contract of sale; and though part of the contract, yet collateral to the express object of it.<sup>2</sup>

The view of the sales contract thus expressed is that fundamentally the contract serves merely to pass title to goods from the seller to the buyer, and consequently any other matters are "collateral."

Seventy years later essentially the same definition appears in *Corpus Juris Secundum*,<sup>3</sup> and in 1960 the latter was quoted approvingly by the St. Louis Court of Appeals.<sup>4</sup> Nor was this concept of warranty without effect; it led the English in section 62 of the *Sale of Goods Act* to provide that where a warranty is breached, the buyer may not return the goods, but may only seek redress in an action for damages.<sup>5</sup> Breach of warranty,

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1. 1 WILLISTON, SALES § 181 (3d ed. 1948).

2. BIDDLE, WARRANTIES IN THE SALE OF CHATTELS 1 (1884). See also VOLD, SALES § 85 (3d ed. 1959).

3. 77 C.J.S. Sales § 301 (1954).

4. Mitchell v. Rudasill, 332 S.W.2d 91, 94-95 (St. L. Mo. App. 1960).

5. SALE OF GOODS ACT, 1894, 56 & 57 Vict., c. 71:

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to the claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

The provision as to Scotland clearly is in recognition of that country's civil law background. To the extent to which we have come to recognize warranties as an integral, essential part of the sale contract, we have adopted the civil law view of this device. Thus Domat in 1694 describes the engagements of the seller to the buyer as being of four types: (1) to deliver the thing sold, (2) to care for it be-

in other words, was not sufficiently close to the core of the sale contract to permit the buyer to reject the goods and revert title in the seller.

The modern American view of warranties, on the other hand, as embodied in the *Uniform Sales Act* and the *Uniform Commercial Code*, is that they are central to the sale contract, being an incidental and integral part thereof. As stated in the Official Comments to the *Uniform Commercial Code*, "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell."<sup>6</sup>

Missouri did not adopt the *Uniform Sales Act*, and has never, prior to 1965, codified its sales law. Accordingly, before the adoption of the UCC, there are no Missouri statutes relating to sales warranties, and warranty law has been entirely court-made. Nevertheless, since the *English Sale of Goods Act* and the *Uniform Sales Act* were largely codifications of the common law, the Missouri law of warranties has been generally similar to that of the other states. And to the extent that the Sales Article of the UCC incorporates the provisions of the English act and the *Uniform Sales Act*, the new Code will not make sweeping changes in Missouri warranty law. In a number of respects, however, the UCC does bring about modifications and refinements, and there are one or two areas of substantial reform.

Basically, under the UCC as under prior law, sales warranties fall into three categories: express warranties, warranties of title, and implied warranties of quality. A word as to the nature of each is in order.

Express warranties are statements or promises relating to the goods, made by the seller to induce the sale thereof, and which are acted upon by the buyer to the extent that the sale is consummated.

The warranty of title relates to the nature of the seller's interest in the thing sold; the buyer normally believes that the seller has a good title to the goods, without encumbrances, and is free to sell them. This expectation is recognized and enforced by the warranty of title, which is imposed by law upon the sale contract.

fore delivery, (3) to protect the buyer against the claims of others, and (4) relating "to the faults of the thing sold." As to the latter, Domat says:

Since people buy things only to employ them to the uses for which they are destined, this is a fourth engagement which the seller is under to the buyer, to take back the thing sold, if it has such faults and defects as render it unfit for use, or too troublesome, or to diminish the price of the thing; whether the defects were known to the seller or not. And if he knows them, he is obliged to declare them.

1 DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 198-99 (Strahan transl. 1850).

6. Comment 4 to UCC § 2-313 (1962).

Implied warranties are obligations relating to the quality and nature of the goods which the law imposes upon the seller in a sale contract. Are the goods suitable for the purposes for which such goods are ordinarily used; are they equal in quality to other, similar goods available in the marketplace; will they perform any special functions made known to the seller, and upon whose choice of goods for such purpose the buyer relies? This implied warranty of quality may arise in part from the legitimate expectations of the parties, but perhaps in greater part it arises from the public policy to protect buyers from goods of inferior or harmful quality.

These sales warranties have long been recognized in principle by the Missouri courts, and they are given force and effect by the UCC. Seven sections of the Code relate specifically to sales warranties, sections 400.2-312 through 400.2-318. These sections deal with the nature, creation and interpretation of warranties as well as with the persons they affect and how in a given sale they may be excluded or modified.

## I. EXPRESS WARRANTIES: 400.2-313

### A. *Nature of Express Warranty*

In a sales transaction,<sup>7</sup> an express warranty arises from a promise or affirmation of fact made by the seller to the buyer to induce the purchase of the goods. The Missouri courts have recognized express warranties in sales contracts, and have described them in this fashion.<sup>8</sup>

Section 400.2-313(1) of the *Uniform Commercial Code* as enacted in Missouri generally restates what has long been the law of this state, but with some refinement. The section provides that an express warranty arises in a sales contract when any of the following is made "part of the basis of the bargain": (a) an affirmation or promise by the seller which relates to the goods; (b) a description of the goods; (c) a sample or model of the goods.

The precise meaning of "part of the basis of the bargain" is not set forth in the Code. Apparently whether a particular statement, description or sample is a part of the basis of the bargain will depend upon the

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7. Express warranties are not limited to sales contracts. See, e.g., *Stone v. Farmington Aviation Corp.*, 363 Mo. 803, 253 S.W.2d 810 (1953), involving an express warranty allegedly made by the lessor of an airplane when he said to the lessee, "It is all ready to go; it is in good shape."

8. *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522 (Mo. 1964); *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945).

facts of the particular case. Some guidance is furnished by the Official Comment: "The sole question is whether the language or samples or models are fairly to be regarded as part of the contract."<sup>9</sup>

One substantial change relating to the creation of express warranties has been brought about by the Code. Express warranties being contractual, the Missouri courts have required them to be supported by consideration. Of course an express warranty made at the time of contracting is amply supported by the consideration relating to the contract itself, principally by the buyer's promise or payment of the purchase price. However, it has been held that statements or representations made by the seller after the sale, "being without consideration, could not be invoked or relied upon as obligations of warranty."<sup>10</sup>

The *Uniform Commercial Code*, in section 400.2-209(1), provides that "An agreement modifying a contract within this article needs no consideration to be binding." Accordingly, under the Code, absence of consideration is no bar to the making of an express warranty after the agreement has been entered into, provided of course that the language can be said to be "part of the basis of the bargain."<sup>11</sup>

### B. *Affirmation or Promise*

Section 400.2-313(1)(a) provides that an express warranty is created by an affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain. Where such a warranty is made, the goods must conform to the affirmation or promise.

Express warranties of this nature normally arise from negotiation or "dickering" in the bargaining process relating to a particular sale. Generally these warranties serve to identify with greater precision the nature and quality of the goods the seller seeks to sell.

The Missouri courts have recognized, for example, that an express warranty may arise from a seller's statement that fatena, a hog feed, was "a whole and complete feed,"<sup>12</sup> or that a particular jack is a "good performer and sure breeder."<sup>13</sup> In addition, express warranties may arise outside of the area of negotiation, as where the seller makes statements

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9. Comment 7 to UCC § 2-313 (1962).

10. *Dotson v. International Harvester Co.*, 285 S.W.2d 585, 591 (Mo. 1955).

11. See Comment 7 to UCC § 2-313 (1962).

12. *Ralston Purina Co. v. Swaithes*, 142 S.W.2d 340 (K.C. Mo. App. 1940).

13. *Burns v. Limerick*, 178 Mo. App. 145, 165 S.W. 1166 (K.C. Ct. App. 1914).

in a newspaper advertisement<sup>14</sup> or on the product label.<sup>15</sup> Presumably the Code would not modify these holdings.

### C. *Description of the Goods*

Where a description of the goods is made part of the basis of the bargain, section 400.313(1)(b) provides that an express warranty is created that the goods shall conform to the description. Denominating the warranty of description as an express warranty represents a departure from the *Uniform Sales Act*, which provided that the warranty of description is implied.<sup>16</sup> The reason for this modification, no doubt, is that in many cases it is impossible to distinguish between an affirmation of fact relating to the goods and a description of the goods;<sup>17</sup> this has caused serious problems relating to interpretation and disclaimer.

The Missouri decisions are in accord with the UCC, except that they have characterized the warranty of description as implied rather than express. Thus as early as 1884 the St. Louis Court of Appeals said:

[T]he sale of an article which the buyer has not seen, by a specific description whose meaning is a matter of common understanding, and known to the parties, always implies a guaranty that the article, when delivered, shall be of the particular description. This guaranty has no reference to either quality or value, and depends upon no warranty of either. It is as if A should sell a horse to B, and deliver a cow instead. It would not help A's breach of con-

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14. *DeGouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (K.C. Ct. App. 1936). Here the advertisement was rejected as a warranty, because the buyer saw it only after purchasing the goods. Whether such a subsequent advertisement could be of any effect under the UCC is not entirely clear. Assume, for example, a case in which the buyer purchases animal feed, intending to supplement it with vitamins, minerals and other ingredients. The seller then places an advertisement that the feed is a "complete food," with the result that the buyer sees the statement and abandons the supplement, feeding only the purchased feed. The animals suffer from malnutrition as a result thereof. Has the buyer a cause of action under the Code for breach of express warranty?

15. *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952); *DeGouveia v. H. D. Lee Mercantile Co.*, *supra* note 14.

16. UNIFORM SALES ACT § 14.

17. Consider, for example, *Childs v. Emerson*, 117 Mo. App. 671, 93 S.W. 286 (St. L. Ct. App. 1906), where the seller offered to sell a jack 15½ hands high, weighing 1000 pounds. Was this an affirmation of fact or a description relating to the goods? The court held that because the parties were dealing with a *specific* animal, the warranty was express, rather than the implied warranty of description. On the other hand, where the goods are of a fungible nature, the warranty has been said to be implied. *Long Bros. v. J. K. Armsby Co.*, 43 Mo. App. 253 (K.C. Ct. App. 1891) ("strictly choice evaporated apples," the same being a mercantile grade).

tract, to set up that the cow was worth as much as the horse, or that there was no warranty of value.<sup>18</sup>

Again, as recently as 1959, the existence of the warranty of description has been reaffirmed in a case where a farmer ordered sargo seed but milo seed was delivered.<sup>19</sup>

#### D. *Sample or Model*

Section 400.2-313(1)(c) provides that where a sample or model is made a part of the basis of the bargain, an express warranty arises that the goods shall conform to the sample or model. Thus, where a sample of the goods to be sold is drawn from bulk, or the seller exhibits a model of the goods, the buyer may bargain upon the basis that the goods sold will conform to the sample or model. The same result would follow where the buyer furnished the sample or model, and the bargain was sealed with reference thereto. In this sense, the word "sample" apparently refers to existing fungible goods, being drawn from bulk, and "model" to goods to be manufactured.

Missouri decisions recognize the creation of a warranty in a sale by sample or model, but characterize it as an implied, rather than an express, warranty, as did the *Uniform Sales Act*.<sup>20</sup> Thus, the warranty has been held to exist where there was a sale by sample of oranges,<sup>21</sup> wool,<sup>22</sup> and secondhand bags.<sup>23</sup> Likewise where a model of a turkey caller was exhibited by the seller, it was said that "the law implies a warranty on his part to make them according to the sample."<sup>24</sup>

#### E. *Creation of Express Warranty*

Section 400.2-313(2) specifies that to create an express warranty, it is not necessary for the seller to use words such as "warrant" or "guarantee." This has been recognized in this state since at least as early as 1870, when the Missouri Supreme Court said:

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18. *Catchings v. Hacke*, 15 Mo. App. 51, 53-54 (St. L. Ct. App. 1884). This case dealt with the sale of "No. 2 white mixed corn," as did *Whittaker v. McCormack*, 6 Mo. App. 114 (St. L. Ct. App. 1878).

19. *Blackburn v. Carlson Seed Co.*, 321 S.W.2d 520 (Spr. Mo. App. 1959).

20. *UNIFORM SALES ACT* § 16.

21. *Graff v. Foster*, 67 Mo. 512 (1878).

22. *Voss v. McGuire*, 18 Mo. App. 477 (K.C. Ct. App. 1885).

23. *Levine Bag Co. v. Minneapolis Barrel & Bag Co.*, 217 Mo. App. 76, 273 S.W. 204 (St. L. Ct. App. 1925).

24. *Schoenberg v. Loker*, 88 Mo. App. 387 (St. L. Ct. App. 1901).

It is certain that the word "warrant" need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be, or an equivalent to such undertaking.<sup>25</sup>

The UCC section goes on to provide that the seller need not have a specific intention to make a warranty. This, too, is consistent with prior Missouri law,<sup>26</sup> which has considered the words actually used from the standpoint of the buyer.<sup>27</sup>

#### F. *Reliance by Buyer*

Need the buyer rely upon affirmations or promises by the seller for an express warranty to be created? Both under the *Uniform Sales Act*<sup>28</sup> and under prior Missouri law, it is clear that reliance is necessary. Thus in the leading case of *Turner v. Central Hardware Co.*, the Missouri Supreme Court said:

[R]eliance by the purchaser upon the affirmation is one of the requisites of a cause of action for breach of warranty and one of the plaintiff's burdens is the proof of that element.<sup>29</sup>

Moreover, such reliance must be justifiable; therefore where a farmer who was a part-time implement dealer made affirmations concerning a corn-planter to a neighboring farmer who purchased the machine, it was held that no express warranty was created because the buyer and seller were on the same footing, and the buyer could not justifiably rely upon the seller's statements.<sup>30</sup>

The *Uniform Commercial Code* abandons the requirement of reliance, emphasizing instead whether the affirmation or promise becomes part of the basis of the bargain. Comment 3 to UCC Section 400.2-313 states:

In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements

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25. *Carter v. Black*, 46 Mo. 384, 385 (1870). See also *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945).

26. *Charles F. Curry & Co. v. Hedrick*, 378 S.W.2d 522 (Mo. 1964).

27. *Turner v. Central Hardware Co.*, *supra* note 25.

28. § 12.

29. 353 Mo. 1182, 1191, 186 S.W.2d 603, 608 (1945).

30. *Dotson v. International Harvester Co.*, 285 S.W.2d 585 (Mo. 1955).



need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

It may validly be inquired, therefore, whether the UCC has actually rejected the reliance requirement, or whether it has not merely clothed it in new garments—the test of “basis of the bargain.” That the latter is the case may be seen by examining another area of traditional Missouri warranty law, the principle that where the buyer inspects the goods and buys upon his own judgment rather than upon the seller’s affirmations, no express warranty will arise.<sup>31</sup> The reason given for the rule, of course, has been that the buyer did not rely upon the seller’s statements; translated into UCC language, the seller’s statements did not become a part of the basis of the bargain. On the other hand, where the buyer inspects the goods but does not buy upon his own judgment, instead insisting upon an assurance by the seller as a cautionary measure, to protect against possible mistake,<sup>32</sup> such statement becomes an express warranty because it is made a part of the basis of the bargain.

#### G. Seller’s Opinion and Value of Goods

Section 400.2-312(2) provides that “an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.” In short, “dealer’s talk” or “puffing” does not amount to an express warranty. In a given case, of course, whether an affirmation is mere opinion, or whether it creates a warranty, is a question of fact to be ascertained from all the circumstances.

The rule of this section has long been recognized in Missouri. Thus where a tire dealer stated that certain tires were “better tires” than those

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31. This principle is recognized in *Oak Lawn Sugar Co. v. Sparks Bros. Mule Co.*, 159 Mo. App. 496, 141 S.W. 698 (K.C. Ct. App. 1911); *Doyle v. Parrish*, 110 Mo. App. 470, 85 S.W. 646 (St. L. Ct. App. 1905).

32. *J. A. Tobin Constr. Co. v. Davis*, 81 S.W.2d 474 (K.C. Mo. App. 1935); *Woods v. Thompson*, 114 Mo. App. 38, 88 S.W. 1126 (K.C. Ct. App. 1905). Other decisions fall somewhere between these two positions. Thus in *Branson v. Turner*, 77 Mo. 489 (1883), where one of a yoke of oxen had a sore upon its neck, which was obvious to the buyer, the seller’s statement that “that don’t hurt him; it is most well” was held to constitute an express warranty. On the other hand, in *Moore v. Day Rubber Co.*, 137 Mo. App. 679, 119 S.W. 454 (K.C. Ct. App. 1909), where the buyer knew he was purchasing second-class belting, he was not allowed to treat as an express warranty the seller’s statement that the belting was “as good as any.”

of a competitor which warranted its tires for 12,000 miles, the statement was held to be mere "puffing" and not to amount to a warranty that the dealer's tires would last for more than 12,000 miles.<sup>33</sup> On the other hand, where a seller's agent told buyers that he was selling "good pipe," and that it was "merchantable" and "better than they were getting" from another manufacturer, it was held that the statements amounted to a warranty as to the quality of the pipe.<sup>34</sup> The effect of the seller's statements, then, must be determined by examining the context in which the statements were made.

## II. WARRANTY OF TITLE: 400.2-312

The warranty of title in the sale of goods has long been recognized in Missouri. In 1855 the Missouri Supreme Court laid down the general rule which has been followed down to the present day: "Where the vendor is in possession of personal property, and sells it for full value, the law implies a warranty of title."<sup>35</sup>

Section 400.2-312(1) of the UCC as adopted in Missouri imposes upon a sale transaction a warranty by the seller that "the title conveyed shall be good and its transfer rightful," and that the goods shall be delivered free from any encumbrance, lien or security interest of which the buyer is ignorant. This warranty of title, unless excluded, applies to every sale transaction, whether involving a merchant dealing in goods of the kind, or a casual seller.

Although the warranty of title arises by operation of law, and cannot be described as an "express" warranty, it should be noted that the UCC does not describe it as "implied," leaving that term for warranties of merchantability and fitness.<sup>36</sup> Accordingly, sections relating to exclusion

33. *Callaway & Perkins v. Collier*, 246 S.W. 966 (K.C. Mo. App. 1923). See also *Belt Seed Co. v. Mitchelhill Seed Co.*, 236 Mo. App. 142, 153 S.W.2d 106 (K.C. Ct. App. 1941).

34. *Murphy v. Gay*, 37 Mo. 535 (1866). See also *Wertheimer-Swartz Shoe Co. v. McDonald*, 138 Mo. App. 328, 122 S.W. 5 (Spr. Ct. App. 1909).

35. *Robinson v. Rice*, 20 Mo. 229, 235 (1855). This decision has been followed in *Dryden v. Kellogg*, 2 Mo. App. 87 (St. L. Ct. App. 1876); *Ranney v. Meisenheimer*, 61 Mo. App. 434 (St. L. Ct. App. 1895); *Roark v. Pullam*, 207 Mo. App. 425, 229 S.W. 235 (Spr. Ct. App. 1921); *Schaefer v. Fulton Iron Works Co.*, 158 S.W.2d 452 (St. L. Mo. App. 1942); *Ivester v. E. B. Jones Motor Co.*, 311 S.W.2d 109 (St. L. Mo. App. 1960). The *Schaefer* opinion used the term "fair price" rather than "full price," and the *Ivester* opinion did not mention the requirement of price, although clearly a fair price had been paid.

36. The Missouri decisions have called this an implied warranty of title.

or limitation of implied warranties do not apply to the warranty of title.<sup>37</sup> Instead, section 400.2-312(2) provides that the warranty of title may be excluded or modified only by specific language or by circumstances giving the buyer reason to know that the seller is not guaranteeing title in himself or is selling only such right as he or a third person may have. Circumstances of this nature are present where, for example, goods are being sold by a sheriff or an administrator.

An early Missouri case, *Ranney v. Meisenheimer*,<sup>38</sup> aptly illustrates this point. There Ranney, who had unknowingly purchased a mortgaged yoke of oxen, sold them to Keith. Keith died and his administrator sold the oxen to Meisenheimer, who resold them to Ranney. At this point they were claimed by the mortgagee, and Ranney brought suit against Meisenheimer for breach of the warranty of title. Meisenheimer defended on the basis of Ranney's prior ownership, and upon Ranney's warranty of title in the sale to Keith. The court held this to be unavailing, both because of the lack of privity and because Meisenheimer, purchasing at an administrator's sale, received no warranty of title.

The Missouri decisions have indicated that the warranty of title arises only when the seller is in possession of the goods, although no case seems to have arisen where the warranty was denied because the seller was not in possession. The Code imposes no such requirement of possession; section 400.2-312 is applicable without regard to whether the goods are in the seller's possession,<sup>39</sup> and the warranty would exist, so it would seem, even if the goods were not yet in being.

Finally, it appears that knowledge by the buyer that the seller does not in fact have a clear title may impair the warranty of title given under 400.2-312(1). However, the seller may also expressly warrant the title, and in such case the Missouri courts have held that knowledge of the buyer of imperfections in the title does not defeat the warranty.<sup>40</sup> Presumably the law has not been changed in this respect by the UCC.

### III. WARRANTY AGAINST INFRINGEMENT

Section 400.2-312(3) creates a warranty against "infringement or the like" arising out of the sale of goods by a merchant regularly dealing

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37. § 400.2-316, RSMo 1963 Supp. See also Comment 6 to UCC § 2-312 (1962).

38. 61 Mo. App. 434 (St. L. Ct. App. 1895).

39. Comment 1 to UCC § 2-312 (1962).

40. *Neville v. Hughes*, 104 Mo. App. 455, 79 S.W. 735 (St. L. Ct. App. 1904).

in goods of the kind. The warranty is meant to protect the buyer against the claims of third persons based upon patent, trade-mark or other infringement. The warranty may be disclaimed by agreement, and does not exist where the buyer furnishes specifications for the goods; in the latter case, the buyer is under a duty to hold the seller harmless against claims arising due to the seller's compliance with the specifications.

This warranty seems to be something of an innovation, and there are no Missouri decisions which relate to such a warranty, either by the seller or the buyer who furnishes specifications.

#### IV. IMPLIED WARRANTIES—MERCHANTABILITY AND FITNESS: 400.2-314, 400.2-315

The most important sales warranties, both in terms of their value to the buyer and in terms of the amount of litigation they produce, are the implied warranties of quality. Imposed by law upon the sales contract, these implied warranties relate to the nature and quality of the goods, serving to assure the buyer that the goods he purchases are not worthless, defective or harmful.

The *Uniform Commercial Code* modifies in substantial degree the Missouri law of implied warranties, broadening and clarifying the existing warranties, as well as changing to some degree the terminology used. Missouri law relating to implied warranties long was narrowly restricted to a very few categories including food, grain to be delivered elsewhere or in the future, and articles purchased for a special purpose where the buyer relied upon the seller's selection.<sup>41</sup> The law of implied warranties has developed slowly from early cases involving the sale of animals and slaves, where with the exception of warranty of title caveat emptor was the rule; until very recently the law has retained a strong horse-trading, buyer-beware flavor. Within the last decade, however, the courts have decided a number of cases whose effect has been to broaden substantially the scope of the implied warranty of quality. On the eve of the adoption of the UCC, this warranty covered such things as processed animal food, automobiles and other manufactured products.

The Code, consistent with prior Missouri law, recognizes two implied warranties: merchantability and fitness for a particular purpose. The

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41. The definitive article on implied warranties in Missouri is Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 Mo. L. Rev. 147 (1945).

coverage of these warranties, however, departs somewhat from earlier Missouri warranties of fitness and merchantability. The warranty of merchantability under the UCC applies in all sales transactions where the seller is a merchant in goods of the kind. This warranty has been only incompletely recognized by the Missouri courts. The UCC warranty of fitness, on the other hand, which has repeatedly been acknowledged in the Missouri decisions, applies only in cases where the buyer makes known to the seller his special needs and relies upon the seller's choice of goods for the particular purpose. The warranty does not apply to goods used for ordinary purposes. These warranties, together with their effect upon existing Missouri law, are discussed below.

### *A. Implied Warranty of Merchantability*

Under section 400.2-314(1), an implied warranty of merchantability arises in all sales in which the seller is a merchant<sup>42</sup> in goods of that kind, including the serving of food or drink for value to be consumed on or off the premises. To be merchantable, section 400.2-314(2) provides that goods must at least be such as:

- a) pass without objection in the trade under the contract description; and
- b) in the case of fungible goods, are of fair average quality within the description; and
- c) are fit for the ordinary purposes for which such goods are used; and
- d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- e) are adequately contained, packaged, and labeled as the agreement may require; and
- f) conform to the promises or affirmations of fact made on the container or label if any.

Moreover, under section 400.2-314(3), course of dealing or usage of trade<sup>43</sup> may give rise to additional implied warranties.<sup>44</sup>

The Official Comments to the section make clear that the coverage

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42. "Merchant" is defined in § 400.2-104, RSMo 1963 Supp.

43. These terms are defined in § 400.2-105, RSMo 1963 Supp.

44. Compare *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547, 549 (Mo. 1959), where it was alleged that a trade usage existed "whereby manufacturers of prepared fish foods marketed only 'complete' fish foods."

of the warranty of merchantability is relative, depending upon the nature of the goods themselves and the particular standards of quality which may exist in a given line of trade.<sup>45</sup> For example, in the sale of second-hand goods by such a merchant, a warranty of merchantability will exist; however, its content will only include obligations "appropriate to such goods."<sup>46</sup>

The warranty obligation extends to all sellers who are merchants in the particular kind of goods sold, and includes merchants who do not manufacture or otherwise produce the goods, but acting as wholesalers or retailers, serve principally as conduits in the marketing system. If a seller is not a merchant, this particular implied warranty of merchantability does not arise. Nevertheless, if a non-merchant seller "guarantees" the goods, the obligations of the warranty of merchantability may serve as a "guide to the content of the resulting express warranty."<sup>47</sup>

In Missouri, there has long been confusion and uncertainty as to the content and even the existence of the implied warranty of merchantability. The earliest cases dealt with the sale of animals, and held that no warranties of quality or soundness would be implied. Thus in *Lindsay v. Davis*,<sup>48</sup> decided in 1860, Judge Napton said for the court:

There must be a warranty or fraud to hold the vendor of a horse with a secret malady responsible to the purchaser. The maxim that a sound price implies a sound commodity, although a favorite one in the civil law, and occasionally borrowed to settle questions under our system, has never met with general favor, or taken root as a permanent part of the common law. Our law is, that the buyer takes the risk of quality and condition, unless he protects himself by a warranty, or there has been a false representation fraudulently made by the vendor.<sup>49</sup>

This view of the sale of animals continued to be expressed well into the present century, and formed the basis of the 1926 decision in *Barton v. Dowis*,<sup>50</sup> where hogs sold for breeding purposes were afflicted with cholera,

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45. Comment 2 to UCC § 2-314 (1962).

46. Comment 3 to UCC § 2-314 (1962).

47. Comment 4 to UCC § 2-314 (1962).

48. 30 Mo. 406 (1860).

49. *Id.* at 409-10. See also *Matlock v. Meyers*, 64 Mo. 531 (1877).

50. 315 Mo. 226, 285 S.W. 988 (1926). See also *Shank v. Lesich*, 296 S.W. 224 (Spr. Mo. App. 1927), and *Wells v. Welch*, 205 Mo. App. 136, 224 S.W. 120 (Spr. Mo. App. 1920), setting forth the general rule, but holding further that if the seller knew of the diseased condition of the animals, the buyer might have a cause of action for fraud.

which infected other hogs owned by the buyer, and it was held that the buyer could not recover in the absence of an express warranty.<sup>51</sup>

With regard to food for human consumption, on the other hand, an implied warranty of merchantability was recognized at an early date, although in many cases the language of "fit for the use intended" was used to describe the warranty.<sup>52</sup> It was held that this implied warranty of wholesomeness applied also to food served in restaurants<sup>53</sup> and cafeterias.<sup>54</sup>

Similarly, in the courts of appeals, an implied warranty of merchantability was held to arise in cases involving the sale of grain to be delivered at some future date, or to be delivered to the buyer over a substantial distance. Thus where a buyer at Shreveport, Louisiana, ordered a car load of corn from sellers in Kansas City, and the corn arrived wet and rotten, the sellers were held to have breached an implied warranty that the corn would be merchantable when delivered.<sup>55</sup> The principle was also held applicable to the sale of ice by a manufacturer to a dealer.<sup>56</sup>

In at least one case, the courts of appeals extended the warranty of merchantability to manufactured goods. It was held in *J. B. Colt Co. v. Preslar*<sup>57</sup> that in the sale of a light plant an implied warranty arose that it would give reasonable service. Other decisions apparently reached essentially the same result through extending the warranty of fitness to include particular or specific uses by the buyer which in fact were quite ordinary.<sup>58</sup>

51. The court held that although the hogs were sold for breeding, a special purpose, which gave rise to an implied warranty of fitness, the warranty of fitness for breeding did not extend to any disease which the hogs might have had, so long as the disease did not interfere with their breeding capabilities.

52. *St. Louis Brewing Ass'n v. McEnroe*, 80 Mo. App. 429, 431 (K.C. Ct. App. 1899). See also *Beyer v. Coca-Cola Bottling Co.*, 75 S.W.2d 642 (St. L. Mo. App. 1934); *Fantroy v. Schirmer*, 296 S.W. 235 (St. L. Mo. App. 1927); *Crocker Wholesale Grocer Co. v. Evans*, 272 S.W. 1017 (Spr. Mo. App. 1925).

53. *Smith v. Carlos*, 215 Mo. App. 488, 247 S.W. 468 (Spr. Ct. App. 1923).

54. *Stewart v. Martin*, 353 Mo. 1, 181 S.W.2d 657 (1944).

55. *Atkins Bros. v. Landa*, 119 Mo. App. 119, 95 S.W. 949 (K.C. Ct. App. 1906). See also *Yontz v. McVean*, 202 Mo. App. 377, 383, 217 S.W. 1000, 1002 (K.C. Ct. App. 1920), where the court said that it was "implied that the corn should be merchantable; that is, of good quality and salable, though not necessarily the best."

56. *St. Louis Union Packing Co. v. Mertens*, 150 Mo. App. 583, 131 S.W. 354 (St. L. Ct. App. 1910).

57. 274 S.W. 1100 (Spr. Mo. App. 1925).

58. See, e.g., *London Guar. & Acc. Co. v. Strait Scale Co.*, 322 Mo. 502, 15 S.W.2d 766 (1929); *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830 (St. L. Mo. App. 1952); *Columbia Weighing Mach. Co. v. Young*, 222 Mo. App. 144, 4 S.W.2d 828 (K.C. Ct. App. 1928).

In 1944 the Missouri Supreme Court utterly demolished the implied warranty of merchantability in the landmark decision in *State ex rel. Jones Store Co. v. Shain*.<sup>59</sup> There the purchaser of a blouse had allegedly contracted a dermatitis from the blouse, and brought action for breach of implied warranty against the seller. The Kansas City Court of Appeals affirmed a judgment for the buyer, stating that the implied warranties applicable to food and grain should also apply to clothing;<sup>60</sup> one judge dissented, and the case was transferred to the Missouri Supreme Court. The Supreme Court quashed the opinion of the Kansas City Court of Appeals, referring to the earlier cases relating to the sale of animals, and holding that the general rule of caveat emptor applies to the sale of personal property. The sole implied warranty available to the buyer was that of fitness, but because the blouse was purchased only for the ordinary purpose of wear, and not for any special purpose, the sale gave rise to no warranty of fitness.<sup>61</sup>

Following the *Jones Store Co.* decision, it was held in *Zesch v. Abrasive Co. of Philadelphia*<sup>62</sup> that no implied warranty of quality attached to the sale of a cutting wheel, where the wheel was not furnished for a "particular special purpose." The United States district court read the two cases as holding that the only implied sales warranty was one of fitness, and said, "the doctrine of implied warranty of merchantability is not an axiom likely to be sustained by the Supreme Court of Missouri."<sup>63</sup> And in the 1952 St. Louis Court of Appeals case of *Worley v. Procter & Gamble Mfg. Co.*<sup>64</sup> the court relied upon a theory of misrepresentation rather than warranty to sustain a cause of action in a products liability case.

Within the last decade, however, there has been a resurrection of

59. 352 Mo. 630, 179 S.W.2d 19 (En Banc 1944).

60. *Marra v. Jones Store Co.*, 170 S.W.2d 441 (K.C. Mo. App. 1943).

61. Professor Lee-Carl Overstreet responded to the *Jones Store Co.* case with a searching law review article which illustrated in a definitive manner the extent to which the Missouri Supreme Court had departed from sound legal thinking in that case. Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 Mo. L. Rev. 147 (1945).

62. 353 Mo. 558, 183 S.W.2d 140 (1944).

63. *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708, 713 (W.D. Mo. 1949). "The gist of the ruling made by the Court in the here referred to cases is that absent the factors stated, the axiom of caveat emptor is the doctrine to be applied to contracts of sale in Missouri." *Id.* at 712. See also *Ross v. Philip Morris Co.* 164 F. Supp. 683 (W.D. Mo. 1958).

64. 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952). The court also fell back upon express warranty, finding an affirmation of fact in a statement upon the package that "Tide is kind to your hands."



the implied warranty of merchantability by the Missouri courts. In *Midwest Game Co. v. M.F.A. Milling Co.*,<sup>65</sup> decided in 1959, the Missouri Supreme Court held that there is an implied warranty of merchantable quality in the sale of processed animal food, although the opinion also denominated this a "warranty of fitness." The following year, the Springfield Court of Appeals expressly rejected the holding of the *Jones Store Co.* case, and held that in the sale of an automobile there is an implied warranty "that it be reasonably fit for use intended," even where this was an ordinary use.<sup>66</sup>

Finally, in *Morrow v. Caloric Appliance Corp.*,<sup>67</sup> the Missouri Supreme Court in 1963 held that an implied warranty of quality attached to the sale of a gas cooking stove. Although the opinion dealt primarily with the question of privity of contract, the cause of action was based upon an implied warranty of merchantability, and in holding the manufacturer liable to the ultimate consumer there is no question but that the court swept away the restrictive holdings in the *Jones Store Co.* and *Zesch* cases.<sup>68</sup>

The *Uniform Commercial Code*, through its explicit provisions relating to the implied warranty of merchantability, will finally lay to rest whatever ghosts of the *Jones Store Co.* case may still be abroad in the jurisprudence of this state. By its careful delineation between the implied warranty of merchantability and the implied warranty of fitness, the Code will serve to clarify legal thinking and to insure harmonious and sensible results in future warranty cases.

### B. *Implied Warranty of Fitness*

Section 400.2-315 sets forth the implied warranty of fitness for a particular purpose. It provides that where the buyer gives the seller reason to know a particular purpose for which the goods are to be used, and that the buyer is relying upon the seller's skill or judgment to select or furnish such goods, an implied warranty will arise that the

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65. 320 S.W.2d 547 (Mo. 1959). See also *Albers Milling Co. v. Carney*, 341 S.W.2d 117 (Mo. 1960) (processed turkey feed); *Borman v. O'Donley*, 364 S.W.2d 31 (K.C. Mo. App. 1962) (silage).

66. *Mullins v. Sam Scism Motors, Inc.*, 331 S.W.2d 185, 195 (Spr. Mo. App. 1960). See also *Miller v. Andy Burger Motors, Inc.* 370 S.W.2d 654 (Spr. Mo. App. 1963). Cf. *Mitchell v. Rudasill*, 332 S.W.2d 91 (St. L. Mo. App. 1960) (sale of cow).

67. 372 S.W.2d 41 (Mo. En Banc 1963).

68. See *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964), for an early reaction to the *Morrow* case by the federal courts.

goods are fit for such purpose. The Official Comment makes clear that the buyer's particular purpose must differ from the ordinary purpose for which such goods are used; it must be special or peculiar to the buyer's business or other needs. If the purpose is only an ordinary one the warranty of merchantability will apply.<sup>69</sup> The warranty of fitness applies to any seller whose skill or judgment is relied upon by the buyer in this fashion, and may therefore be imposed upon non-merchants as well as merchants.<sup>70</sup>

As specified in the Code the implied warranty of fitness for a particular purpose is imposed where the buyer makes known his special needs and the seller supplies goods to meet those needs. In this respect, the warranty of fitness resembles to some degree an express warranty; and indeed in a given case it might be hard to determine whether the conduct of the parties has created an express warranty or an implied warranty of fitness. For example, where the buyer tells the seller that he wants a corn planter that will "plant this corn nine inches apart, that we could use at high speed, and that would put the fertilizer down in the same operation," and the seller says that "this planter will be especially suitable for your use," is the resulting warranty express, or an implied one of fitness?<sup>71</sup>

Numerous Missouri judicial decisions have recognized the warranty of fitness for a particular use. Thus, as early as 1890, a case came before the Kansas City Court of Appeals involving the sale of tin foil, which the seller knew was intended by the buyer to be used for wrapping plug tobacco; the foil delivered turned out to be bottlers' foil, and worthless for the buyer's purpose.<sup>72</sup> The court said:

The principle is elemental that, when a dealer contracts to supply an article in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment of the dealer, there is, in that case, an implied term of warranty, that it shall be reasonably fit for the purpose to which it is to be applied.

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69. Comment 2 to UCC § 2-315 (1926).

70. Comment 4 to UCC § 2-315 (1962).

71. In *Dotson v. International Harvester Co.*, 285 S.W.2d 585 (Mo. 1955), the court assumed that a warranty of fitness resulted.

72. *Armstrong, Gilbert & Co. v. The Johnson Tobacco Co.*, 41 Mo. App. 254 (K.C. Ct. App. 1890). Perhaps the earliest recognition of this warranty of fitness by a Missouri appellate judge came in Judge Napton's dissenting opinion in *Ferguson v. Huston*, 6 Mo. 407 (1840).

In such case the buyer trusts to the dealer and relies upon his judgment.<sup>73</sup>

Other Missouri courts of appeals decisions followed, involving such things as a ventilating fan to be used in connection with sand blasting,<sup>74</sup> and lumber to be used for building a boat.<sup>75</sup> In 1924 the Missouri Supreme Court found an implied warranty of fitness in the sale of a tractor,<sup>76</sup> and two years later in the sale of a scaffolding designed to meet the special needs of the buyer.<sup>77</sup>

Perhaps because the existence of any other implied warranty of quality was doubtful at best, the Missouri courts often applied the warranty of fitness to cases where the contemplated use of the goods was only ordinary. In short, to avoid the harsh result of caveat emptor, the courts were willing to extend the warranty of fitness to protect buyers where goods proved defective. Thus where a cast iron beam on a scale broke the first time it was used, the Missouri Supreme Court was quick to find that the scale had been sold for a particular purpose, and therefore imposed an implied warranty of fitness.<sup>78</sup> This liberal approach was flatly rejected in 1944 by the supreme court in *State ex rel. Jones Store Co. v. Shain*,<sup>79</sup> where the sale of a blouse was held not to be for a particular purpose, and consequently no implied warranty of fitness attached. Under the UCC, of course, the warranty of merchantability extends to all ordinary uses such as this, and the buyer will be protected.

Finally, in the application of the implied warranty of fitness, it is amply clear that the buyer must actually rely upon the seller's skill or judgment in furnishing goods for the buyer's special purpose.<sup>80</sup> This element has been recognized by the Missouri courts on several occasions.

73. 41 Mo. App. at 258.

74. *Skinner v. Kerwin Ornamental Glass Co.*, 103 Mo. App. 650, 77 S.W. 1011 (St. L. Ct. App. 1903).

75. *Antrim Lumber Co. v. Daly*, 190 S.W. 971 (K.C. Mo. App. 1916).

76. *Hunter v. Waterloo Gasoline Engine Co.*, 260 S.W. 970 (Mo. 1924).

77. *Busch & Latta Painting Co. v. Woermann Constr. Co.*, 310 Mo. 419, 276 S.W. 614 (1925).

78. *London Guar. & Acc. Co. v. Strait Scale Co.*, 322 Mo. 502, 15 S.W.2d 766 (1929). See also *Columbia Weighing Mach. Co. v. Young*, 222 Mo. App. 144, 4 S.W.2d 828 (K.C. App. 1928).

79. 352 Mo. 630, 179 S.W.2d 19 (En Banc 1944). The *Jones Store Co.* case, however, was not faithfully followed by the courts of appeals. See *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830, 832 (St. L. Mo. App. 1952): "In the sale of an automobile there is an implied warranty that it is reasonably fit for the use intended."

80. Comment 1 to UCC § 2-315 (1962).

Thus, where the buyer desired to purchase frozen food cartons in which to package chili, and informed the seller thereof, but conducted its own tests of the suitability of sample cartons furnished by the seller, the warranty of fitness was held inapplicable.<sup>81</sup> The buyer plainly had not relied upon the seller's skill, but upon its own.

## V. PRIVACY OF CONTRACT

In the last half-century, perhaps the most striking judicial development in relation to sales warranties has been the extension of warranty protection to persons not in contractual privity with the seller of the goods. The attack upon the requirement of privity has come along two lines: (1) extension of implied warranty liability to the retail buyer to include, in addition to the retailer with whom there is contractual privity, the wholesaler and manufacturer of the goods; and (2) extension of protection from the buyer himself to members of his family and guests in his household, who may be harmed by defective goods. Moreover, there has been a tendency to enlarge the protection of warranty without contractual privity to an ever-increasing variety of products, beginning with food and drugs for human consumption, and expanding to include products which if defective are inherently dangerous to consumers, and ultimately to non-dangerous products.

This broadening of warranty protection amounts, in essence, to the imposition of strict liability upon manufacturers for harmful effects from defective goods. Therefore, whether it remains a matter of contract law is at least debatable. Some courts have recognized that the abandonment of contractual privity is equivalent to strict liability,<sup>82</sup> and the American Law Institute, in drafting tentative sections for the *Restatement of Torts, Second*, has included strict liability of the manufacturer to the ultimate consumer.<sup>83</sup>

In Missouri, the gradual abandonment of contractual privity as a

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81. *Interstate Folding Box Co. v. Hodge Chile Co.*, 334 S.W.2d 408 (St. L. Mo. App. 1960). See also *Dotson v. International Harvester Co.*, 285 S.W.2d 585 (Mo. 1955); *Davies v. Motor Radio Co.*, 236 S.W.2d 409 (K.C. Mo. App. 1951).

82. See, e.g., *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41, 51 (Mo. En Banc 1963): "The precise question . . . is whether privity of contract is necessary in order for an ultimate consumer to recover from a manufacturer on an implied warranty or, perhaps stated more frankly, whether a manufacturer of an instrumentality which is imminently dangerous if defectively manufactured is to be held to strict liability upon proof of the defect and of causation."

83. *RESTATEMENT (SECOND), TORTS* § 402A (Tent. Draft No. 10, 1964).

prerequisite to warranty recovery has roughly followed the pattern in other jurisdictions. Thus, prior to the turn of the century, and well into this century, the courts laid down that sales warranties "are available only between parties to the contract."<sup>84</sup> The first Missouri decision to breach the privity bulwark was *Madouros v. Kansas City Coca-Cola Bottling Co.*,<sup>85</sup> a mouse-in-a-bottle case which came before the Kansas City Court of Appeals in 1936, and which prompted the court to say that

If privity of contract is required, then, under the situation and circumstance of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons.<sup>86</sup>

The *Madouros* case, based upon the "sealed package" doctrine holding the manufacturer liable without privity if he packages his goods in sealed containers only to be opened by the consumer, was followed by several other courts of appeals decisions involving soft drinks,<sup>87</sup> buttermilk,<sup>88</sup> and packaged bread.<sup>89</sup> Where, however, salmon was packed in a sealed can by the manufacturer, it was held that the consumer could not recover against the wholesaler for breach of implied warranty.<sup>90</sup>

The Missouri Supreme Court decision in *State ex rel. Jones Store Co. v. Shain*,<sup>91</sup> in 1944, caused great uncertainty as to the law of warranty in Missouri, and cast a shadow upon the earlier courts of appeals decisions relating to privity. Thus, the federal district courts in Missouri consistently held that, under the law of Missouri, privity of contract was necessary to any warranty action.<sup>92</sup>

84. *Ranney v. Meisenheimer*, 61 Mo. App. 434, 439 (St. L. App. 1895); *Crocker v. Barron*, 234 S.W. 1032, 1033 (St. L. Mo. App. 1921).

85. 230 Mo. App. 275, 90 S.W.2d 445 (K.C. Ct. App. 1936).

86. *Id.* at 283, 90 S.W.2d at 450.

87. *Williams v. Coca-Cola Bottling Co.*, 285 S.W.2d 53 (St. L. Mo. App. 1955); *Foley v. Coca-Cola Bottling Co.*, 215 S.W.2d 314 (St. L. Mo. App. 1948). Cf. *Nemela v. Coca-Cola Bottling Co.*, 104 S.W.2d 773 (St. L. Mo. App. 1937).

88. *Carter v. St. Louis Dairy Co.*, 139 S.W.2d 1025 (St. L. Mo. App. 1940).

89. *Helms v. General Baking Co.*, 164 S.W.2d 150 (St. L. Mo. App. 1942); *McNicholas v. Continental Baking Co.*, 112 S.W.2d 849 (St. L. Mo. App. 1938).

90. *DeGouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (K.C. Ct. App. 1936). On the subject of wholesalers' liability, see Comment, 1955 WASH. U.L.Q. 380.

91. Discussed in text at note 59 *supra*.

92. The leading case is *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949), where a two-year-old plaintiff injured by an exploding bottle in his home was held to have no cause of action for breach of implied warranty because of the lack of contractual privity. See also *Ross v. Phillip Morris Co.*, 164 F. Supp. 683 (W.D. Mo. 1958); *Dennis v. Willys-Overland*

The next important development came in 1952, when the St. Louis Court of Appeals, apparently with full awareness of the implications of the *Jones Store Co.* opinion, held that a consumer had a cause of action for dermatitis against the manufacturer of Tide, where "Tide is kind to your hands" appeared on the box.<sup>93</sup> Noting that warranty originally was a tort theory, "in the nature of an action on the case for deceit,"<sup>94</sup> the court held that liability in the action before it sprang not from contract but from the manufacturer's representations to the consumer. Thereafter, in 1959, the Missouri Supreme Court cited with approval the food cases rejecting privity,<sup>95</sup> while in the same year the St. Louis Court of Appeals refused to abandon the privity requirement in an implied warranty action against an automobile manufacturer involving only a claim for money damages because of defects in the vehicle, where no personal injuries were involved.<sup>96</sup>

Finally, in 1963 in the landmark case of *Morrow v. Caloric Appliance Corp.*,<sup>97</sup> the Missouri Supreme Court at last considered the privity problem and held that a consumer who purchased a gas stove which proved defective and caused a fire which destroyed his house had a cause of action for breach of implied warranty against the manufacturer. The court stated that the imminently dangerous nature of the defective stove impelled the abandonment of the warranty requirement in favor of the consumer.

The *Uniform Commercial Code* does not attempt any definitive resolution of the privity of contract problem, but leaves the matter to the decidedly non-uniform development of the common law in the various states. The UCC restricts its treatment of the subject to a relatively small area. Section 400.2-318 provides that warranties by a seller extend not only to the buyer, but also to members of the buyer's household and guests therein "if it is reasonable to expect that such person may use,

Motors, Inc., 111 F. Supp. 875 (W.D. Mo. 1953); *Wessley v. Seiberling Rubber Co.*, 90 F. Supp. 709 (W.D. Mo. 1950).

93. *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952).

94. *Id.* at 1120, 253 S.W.2d at 536.

95. *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959). See also Anderson, *Observations on the Law of Implied Warranty of Quality in Missouri: 1960*, 1960 WASH. U.L.Q. 71.

96. *Smith v. Ford Motor Co.*, 327 S.W.2d 535 (St. L. Mo. App. 1959). See also Comment, 27 Mo. L. Rev. 194 (1962).

97. 372 S.W.2d 41 (Mo. En Banc 1963); 29 Mo. L. Rev. 217 (1964).

consume or be affected by the goods."<sup>98</sup> This extension includes only those "injured in person" by the breach.<sup>99</sup>

It is expressly provided that this extension of warranty protection may not be limited or excluded by the seller. However, this does not mean that a seller may not limit or exclude warranties entirely, as he may disclaim all warranties in his dealing with the buyer, but only that he may not prevent existing warranties from extending beyond the buyer to his household and guests.

The Code, therefore, leaves unanswered many of the difficult questions involved in further relaxation of the privity requirement. What of privity with regard to wholesalers and manufacturers? What about the guest who is outside the buyer's home?<sup>100</sup> What of the buyer's employee?<sup>101</sup> What of the third person who is unconnected with the buyer except for his personal injuries resulting from defective goods or equipment used by the buyer? The Official Comment to this section states that the section is neutral as to these and other matters, not being "intended to enlarge or restrict the developing case law."<sup>102</sup> Therefore, *Morrow v. Caloric Appliance* remains the law of Missouri, and further developments in this area must come from the Supreme Court of Missouri.

#### VI. INTERPRETATION OF CONFLICTING OR CUMULATIVE WARRANTIES: 400.2-317

Where a sale is made, the seller may make one or more express

98. This section thus abrogates the effect of such decisions as *Conner v. Great Atlantic & Pacific Tea Co.*, 25 F. Supp. 855 (W.D. Mo. 1939), and *McIntyre v. Kansas City Coca Cola Bottling Co.*, 85 F. Supp. 708 (W.D. Mo. 1949).

99. Here the draftsmen of the Code have succumbed to one of the many perils inherent in legislative drafting. Inasmuch as the warranty only extends to a person "injured in person by breach of the warranty," it would appear that the warranty is extended only *when* some person is injured, and not before the injury. The evident purpose of the section is to limit recovery to personal injuries, but unfortunately the language fails to accomplish this purpose. Because the warranty extends to anyone "injured in person," it would follow that such a person has full coverage under the warranty, for property damage as well as personal injuries. The anomalous result follows that a guest who suffers slight personal injuries may recover for any property damage, but the uninjured guest has no recourse on the warranty no matter how great his property damage. This difficulty might have been avoided if the draftsmen had said, "The remedy for breach of such warranty to persons other than the buyer shall be limited to damages for personal injuries."

100. See, e.g., *Kaczmarkiewicz v. J. A. Williams Co.*, 13 Pa. D.&C.2d 14 (1957).

101. See, e.g., *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

102. Comment 3 to UCC § 2-318 (1962). See also Comment 2 to UCC § 2-313 (1962).

warranties relating to the goods. These express warranties may conflict with implied warranties relating to the goods, or may be inconsistent with one another. The *Uniform Commercial Code*, in section 400.2-317, sets forth certain rules of construction to be followed in resolving these conflicts.

The Code provides that where possible, warranties both express and implied shall be construed "as consistent with each other and as cumulative," unless the construction is unreasonable. If consistent, cumulative interpretation is unreasonable, then the intention of the contracting parties shall govern which warranty or warranties shall prevail. In determining the parties' intention, the section lays down that a sample will prevail over inconsistent general language, and that technical or exact specifications will prevail over both a sample and general language. Also, except for the implied warranty of fitness, express warranties will prevail over inconsistent implied warranties; the exception is in recognition of the quasi-express nature of the warranty of fitness, depending as it does upon the buyer's reliance on the seller's choice of goods for a particular purpose.

The Missouri courts have long held that an express warranty excludes an implied warranty on the same subject.<sup>103</sup> However, where the express warranty is narrower than the implied warranty, the buyer may base his claim upon that part of the implied warranty not covered by the express warranty.<sup>104</sup>

It is only when the contract shows on its face that it is exclusive and contains all the obligations attaching to the seller or when an implied warranty is covered by or is inconsistent with an express provision of the contract that all implied warranties are merged in or superceded [*sic*] by the express provisions of the contract.<sup>105</sup>

By and large, in interpreting conflicting warranties, the Missouri courts have sought to reach reasonable results. This policy will not be modified by the adoption of the UCC. Thus in the 1960 case of *Mitchell*

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103. See, *e.g.*, *Hunt v. Sanders*, 313 Mo. 169, 180, 281 S.W. 422, 425 (1926): "The express warranty as to the particulars included within its terms excludes an implied warranty." See also *Mullins v. Sam Scism Motors, Inc.*, 331 S.W.2d 185 (Spr. Mo. App. 1960); *Advance Rumley Thresher Co. v. Briggs Hdwe. Co.*, 202 Mo. App. 603, 206 S.W. 587 (Spr. Ct. App. 1918).

104. *National Cash Register Co. v. Van Duser Supply Co.*, 207 Mo. App. 454, 232 S.W. 1091 (Spr. Ct. App. 1921).

105. *Id.* at 462, 232 S.W. at 1093.



*v. Rudasill*,<sup>106</sup> the seller of milk cows stated, "I will guarantee their bags to be sound and give a decent flow of milk." The buyer sued for breach of warranty because the cows were diseased with mastitis. The case went to the jury on a theory of implied warranty of fitness, and the seller on appeal claimed this to have been in error, because the express warranty excluded any implied warranty. The St. Louis Court of Appeals stated:

A more accurate statement of the correct rule is that an express warranty excludes an implied warranty of fitness (1) if the express warranty is inconsistent with the warranty which would have been implied had none been expressed; or (2) if the express warranty relates to the same or a similar subject matter as one which would have been implied.<sup>107</sup>

Here, the implied warranty was exactly the same as the express warranty, and therefore, said the court, any error in the case was nonprejudicial.

#### VII. DISCLAIMER OF WARRANTIES: 400.2-316

Under the UCC, as under prior Missouri law, it is possible for the seller of goods to disclaim all warranties to the buyer, or to give certain warranties and to disclaim others. Basically, the problem here is twofold; the seller's language of disclaimer must not conflict with other language creating a warranty, and the seller must use language of disclaimer which imparts to the buyer an understanding that certain warranties are being excluded.

The first problem deals principally with express warranties. Will the seller be allowed to sell a horse and then, after specifically disclaiming all warranties, deliver a cow?<sup>108</sup> Section 400.2-316(1) lays down guidelines for the resolution of conflicts between express warranties and disclaimers. It provides that where it is reasonable to do so, language disclaiming warranties must be construed consistently with words or conduct tending to create an express warranty. To the extent that this construction would be unreasonable, the limitation or exclusion of the warranty will not be given effect.

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106. 332 S.W.2d 91 (St. L. Mo. App. 1960).

107. *Id.* at 95.

108. Under the UCC, this appears to be a warranty problem. Prior reasoning, on the other hand, in which warranties were described as "collateral contracts incident to a contract to sell," held that under these circumstances the horse was the subject-matter of the sale contract, or was basic or central to the agreement, and therefore the delivery of a cow would not be a breach of warranty, but a violation of the fundamental sale contract.

Two other Code sections are also applicable to this problem. Section 400.2-302 permits the court to refuse to enforce any contract term which it finds to be "unconscionable," and therefore if in a given situation enforcement of a warranty disclaimer were found to violate the conscience of the court, the court might refuse to give effect to it. This would apply, of course, to unconscionable disclaimers of either express or implied warranties. Further, under section 400.2-202 the parol evidence rule may be invoked to exclude any express warranties not appearing in a writing intended by the parties as a final and complete statement of their agreement. Therefore, by fully integrating the sale contract in a written document, the seller may exclude any prior oral or written promises or affirmations which would otherwise amount to express warranties.

The Code treatment of conflicts between express warranties and disclaimers will doubtless clarify the Missouri law upon this subject. The confused state of prior judicial decisions is aptly illustrated by *Belt Seed Co. v. Mitchelhill Seed Co.*,<sup>109</sup> where the seller offered to sell bluegrass seed of 77% purity and 80% germination. The buyer ordered 300 bags, and the seller returned a printed confirmation of sale stating that the company "gives no warranty, express or implied, as to description, quantity, productiveness, or any other matter of any seeds we send out and we will not be in any way responsible for crop." When received by the buyer, the seed did not test 80% germination, and buyer brought action for breach of warranty. The seller defended on the basis of the disclaimer. The appellate court, after referring to several canons of interpretation, finally pointed out that the buyer's position was weakened because the word "warranty" or its equivalent had not been used in connection with the statement as to 80% germination. The court concluded:

We are of the opinion that, under all of the circumstances, the statement by defendant that the seed would germinate 80 per cent was merely the expression of an opinion.<sup>110</sup>

Where the seller seeks to disclaim implied warranties of merchantability or fitness, language must be used which will clearly communicate such disclaimer to the buyer. Section 400.2-316(2), (3) sets certain standards for the disclaimer of these implied warranties. The broad test is that the language of the disclaimer must be such that it "in common

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109. 236 Mo. App. 142, 153 S.W.2d 106 (K.C. Ct. App. 1941).

110. *Id.* at 153, 153 S.W.2d at 111.

understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is not implied warranty." Such expressions as "with all faults," or "as is," are sufficient to exclude all implied warranties.

More specifically, and subject to the above standard, section 400.2-316(2) sets forth what may be considered the "recommended" manner of disclaiming the implied warranties of merchantability and fitness. To exclude the implied warranty of merchantability, the language used must mention merchantability, and if the disclaimer is in writing it must be conspicuous.<sup>111</sup> The implied warranty of fitness may only be excluded by a conspicuous writing; the Code suggests this language: "There are no warranties which extend beyond the description on the face hereof."

Further, under section 400.2-316(3)(b), where before entering into the sale contract the buyer examines the goods or after demand by the seller refuses to do so, the implied warranties will not extend to defects such examination should have revealed.<sup>112</sup> And section 400.2-316(3)(c) provides that course of dealing<sup>113</sup> or performance,<sup>114</sup> or usage of trade, may further limit or exclude implied warranties. Such custom must, of course, be known to the buyer, or at least the buyer must be chargeable with knowledge thereof.

The UCC should bring about, at the very least, a reexamination of the disclaimer clauses used by sellers to exclude implied warranties. On the other hand, no radical change has been brought about in Missouri law relating to such disclaimers. Numerous decisions have dealt with warranty disclaimers, and it has repeatedly been held that "an express contractual disclaimer of any warranty other than those specifically provided in the written contract precludes proof of, or reliance upon, an implied warranty of fitness."<sup>115</sup> By and large, these decisions have sought to reach reasonable and just results. Thus in a case involving the purchase of a used threshing machine engine, the order blank contained an express warranty, but stated that the warranty "does not apply to secondhand machinery." The court held that inasmuch as the express warranty did

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111. § 400.1-201(10), RSMo 1963 Supp., defines "conspicuous."

112. *Moore v. Miller*, 100 S.W.2d 331 (K.C. Mo. App. 1936), is in accord.

113. "Course of dealing" and "usage of trade" are defined in § 400.1-205, RSMo 1963 Supp.

114. § 400.2-208, RSMo 1963 Supp.

115. *Hargrove v. Lewis*, 313 S.W.2d 594, 595 (Spr. Mo. App. 1958), and cases cited therein. See also *B. H. Tureen Hotels, Inc. v. Nachman & Co.*, 317 S.W.2d 422 (Mo. 1958).

not apply, and there was no express disclaimer of other warranties, the normal implied warranties were applicable.<sup>116</sup>

Finally, as indicated in the section dealing with the warranty of title, section 400.2-316 does not apply to this warranty. The discussion of exclusion or modification of the warranty of title appears under Part II of this paper.

### VIII. REMEDIES FOR BREACH OF WARRANTY

Matters of breach of the sales contract and remedies therefor are treated in detail elsewhere in this Symposium. Several of the UCC's innovations in this area, however, relate particularly to sales warranties and are suitable for brief mention here.

#### A. *Statute of Limitations*

Section 400.2-725(1) requires that actions for breach of a sale contract be brought within four years after the cause of action has accrued. This section applies to warranties, and represents a change from prior Missouri law, which has provided a ten-year period in actions upon written contracts,<sup>117</sup> and a five-year period as to other contracts.<sup>118</sup>

The section further permits the contracting parties to reduce the period of limitation to as little as one year, but not to extend it. This is an innovation in Missouri law; hitherto section 431.030, RSMo has declared null and void any contract limiting the time in which an action may be brought. Under this section of the Code, some question may arise as to the effect upon the rights of third parties of an agreement to shorten the limitation period. Thus, where the retailer and buyer agree that the period shall be one year, what is the effect of this limit upon the rights of a guest in the buyer's home who is injured by the goods? Does section 431.030 continue to set forth the policy of the state as to such persons?

Section 400.2-725(2) makes explicit that the cause of action accrues at the time the breach occurs, irrespective of the knowledge of the aggrieved party, and that unless a warranty extends to future performance, its

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116. *The New Birdsall Co. v. Keys*, 99 Mo. App. 458, 74 S.W. 12 (K.C. Ct. App. 1903).

117. § 516.110, RSMo 1959.

118. § 516.120, RSMo 1959.

breach occurs when delivery of the goods is tendered. This provision may conceivably leave the buyer vulnerable where the warranty of title is concerned; assuming that the seller lacks title, the true owner of the goods has a period of five years under section 516.120, RSMo 1959 in which to bring his action. However, because "the warranty of quiet possession is abolished"<sup>119</sup> by the UCC, the warranty of title to the buyer would seem to be breached when the goods are delivered by the seller. Therefore, the statute would run in favor of the seller in four years from delivery, leaving the true owner as much as an additional year thereafter in which to bring his action against the unprotected buyer, who would have no recourse against anyone for his loss.

### B. *Notice to Seller and Burden of Proof*

Where the buyer discovers a breach of warranty after acceptance of the goods, or is sued for infringement, under section 400.2-607(3) he must notify the seller of such fact within a reasonable time, or he will "be barred from any remedy." This does not appear to be any departure from prior Missouri law relating to breach of warranty.<sup>120</sup>

Where a breach of warranty is alleged, section 400.2-607(4) places the burden of proof of such breach upon the buyer. This, of course, is consistent with prior Missouri law.

### C. *"Vouching in" Seller to Defend*

It has long been recognized that, where warranty of title is concerned, a buyer who is sued by one claiming to be the true owner of the goods may "vouch in" the seller of the goods to defend the action, by giving notice thereof to the seller.<sup>121</sup> In 1958 the St. Louis Court of Appeals stated:

The general rule is that when a suit is brought by a third person against the purchaser, the seller may intervene and defend the title, and if he is duly notified he is bound to do so. When the seller is notified and fails to defend, he is bound by the results of such litigation.<sup>122</sup>

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119. Comment 1 to UCC § 2-312 (1962).

120. But *cf.* *Travers Co. v. Goldman*, 255 S.W. 923 (St. L. Mo. App. 1923); *Advance Rumley Thresher Co. v. Briggs Hdwe. Co.*, 202 Mo. App. 603, 206 S.W. 587 (Spr. Ct. App. 1918).

121. The doctrine was recognized in Missouri over a century ago, in *Johnson v. Blanks*, 34 Mo. 255 (1863).

122. *Ivester v. E. B. Jones Motor Co.*, 311 S.W.2d 109, 111 (St. L. Mo. App. 1958). See also *Schaefer v. Fulton Iron Works Co.*, 158 S.W.2d 452 (St. L. Mo. App. 1942).

Section 400.2-607(5) extends this "vouching in" rule to all warranties or other obligations where the seller is answerable over. Thus, where manufacturer *M* sells goods to retailer *R*, who resells them to consumer *C*, and *C* brings action for breach of implied warranty of merchantability against *R*, *R* may give *M* notice and opportunity to defend. If *M* does not come in and defend, he will be bound in any subsequent action by *R* "by any determination of fact common to the two litigations." Of course, it goes without saying that if *M* does come in and defend he will also be bound.<sup>123</sup>

#### *D. Liquidation and Limitation of Damages*

Section 400.2-718(1) provides that damages for breach of a sales contract, including breach of warranty, may be liquidated in "an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy."

Also, section 400.2-719(3) permits consequential damages to be limited or excluded altogether by the agreement of the parties, where not unconscionable; but any limitation of consequential damages for personal injuries from consumer goods is prima facie unconscionable. Of course, the seller under section 400.2-316 may exclude all warranties and thereby escape the payment of any damages.

#### *E. Measure of Damages*

In addition to the remedies of rejection<sup>124</sup> and revocation of acceptance of goods,<sup>125</sup> the buyer may recover damages for breach of warranty. The basic measure of such damages as set forth in section 400.2-714(2) is the classic one: the difference at the time and place of acceptance between the value of the goods as they actually were, and the value that they would have had if they had been as warranted. Where special circumstances exist, proximate damages of a different amount may be shown. In addition, under section 400.2-715 incidental<sup>126</sup> and consequential damages are available to the buyer.

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123. Where the claim is for infringement, and the buyer is sued, the seller may notify the buyer that he wishes to defend the suit, and to bear the expenses thereof. If the buyer refuses to permit the seller to control such litigation, the buyer may not thereafter assert any remedy against the seller. § 400.2-607(5)(b), RSMo 1963 Supp.

124. § 400.2-602, RSMo 1963 Supp.

125. § 400.2-608, RSMo 1963 Supp.

126. Missouri decisions are in accord. See, e.g., *Schaefer v. Fulton Iron Works Co.*, 158 S.W.2d 452 (St. L. Mo. App. 1952); *Shultis v. Rice*, 114 Mo. App. 274, 89 S.W. 357 (St. L. Ct. App. 1905).